United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1325

B p/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

EDWIN ALMESTICA,

Defendant-Appellant.

----------x

Docket No. 76-1325

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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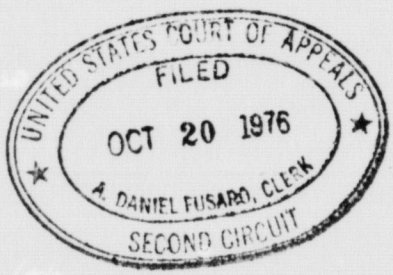

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BRIEF FOR APPELLANT

QUESTION PRESENTED

Whether appellant Edwin Almestica was deprived of his right to effective counsel at his sentencing when his assigned attorney refused to defend him and instead advanced the prosecution's position.

STATEMENT OF THE CASE

Edwin Almestica appeals from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, J.) rendered on June 21, 1976, convicting him upon his plea of guilty to one count of bank robbery

(28 U.S.C. §§ 2113(a) and 2) and sentencing him to eighteen years' imprisonment, subject to 18 U.S.C. § 4205(b)2.

An indictment filed March 17, 1976 (*3) charged Almestica and one Isidro Alvarez with one count of bank robbery and one count of assault and placing life in jeopardy during the robbery (18 U.S.C. §§ 2113(a), 2113(d), and 2) in that they robbed a bank in Brooklyn on March 3, 1976, by use of a dangerous weapon.

On April 8, 1976, Almestica appeared before the Court to enter a plea of guilty to the first count of the indictment. The prosecutor said that the Government had made an agreement with Almestica, that in return for the acceptance of the plea Almestica "agreed to cooperate fully with the Government and to make a full, immediate and truthful disclosure of all information in [his] possession concerning other bank robberies of which [he has] knowledge and in which [he] participated." (12-13) "That's the full extent of the Government's agreement with these two defendants." (13)

Almestica said that he understood the agreement, and that his counsel had explained it to him. (13-14) The prosecutor then said that the Government had agreed to apprise the Court of the full extent of Almestica's

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*Numbers in parentheses are pages in the Appendix for Appellant.

cooperation, prior to sentencing. (14) The Court then asked Almestica if he understood what had been said, and Almestica replied "Yes." (14)

After Almestica's co-defendant pleaded guilty (Almestica pleaded guilty first) the prosecutor said "We will ask sentencing be put off until these men have fully cooperated, which will probably entail testifying at trial." (23) The Court said "It will come up in its normal course. At that point you should make your application." (23) The proceedings then closed.

On June 21, 1976, Almestica appeared for sentence represented by his assigned counsel. While Almestica had testified in the grand jury with respect to others, there was "some problem" with his continued cooperation. (27) Defense counsel said he thought his client had originally indicated he would testify at trial, but had now changed his position. (27) Counsel thought the reason was Almestica's contact in jail with the other defendants. (27-28)

The prosecutor spoke next, reading from a letter (not in the record) which set forth the terms of the cooperation agreement, and which specifically included testifying at trial. (32) The prosecutor had visited Almestica in jail and had been told "I could never hold my head up if I were to testify against" certain individuals. (32-33)

Almestica then addressed the Court. He had "not see[n] any contract whatsoever" and had not been given any to sign by the prosecutor. (33) His lawyer had told him that there would be a contract "and I were to sign it and therefore I would be sworn in as to my testimony, if it was needed in the trial . . . ." (33) He had tried to cooperate to the best of his ability, but could not go further because o the consequences he might face. (33) "I did not make any promises. I said I would help and I helped [by testifying before the grand jury]. (33)

The prosecutor then referred to "the agreement which had been reduced to writing as set out in the record," and Almestica interjected "But the agreement wasn't down on any paper, not that I know of. It was just in court when we came before" the judge. (34)

Defense counsel spoke next: "Your Honor, it is my understanding this was the agreement. I think we took a long time, to be frank, to put this on the record at the time he pleaded." (34) Counsel added "I think Mr. Almestica is giving too much weight as to whether or not he and his attorney signed the agreement. I think the agreement was put on the record at the time" of the plea. (34)

The Court then asked defense counsel if he had explained the agreement made in open court. (34-35) Defense counsel responded "He understands that, but unfortunately he has had a change of mind . . . . It is not uncommon

for a defendant to testify against other individuals in the grand jury and then find a problem in living with himself if he has to testify against those people in open court. He couldn't feel comfortable with himself in testifying . . . ." (35)

The Court then said "Mr. Almestica, you don't leave me much of a choice," and sentenced him to eighteen years' imprisonment. (35)

ARGUMENT

ALMESTICA WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE COUNSEL AT HIS SENTENCING WHEN HIS ASSIGNED LAWYER REFUSED TO DEFEND HIM AND INSTEAD ADVANCED THE PROSECUTOR'S POSITION

Edwin Almestica, an eighteen-year-old drug addict, appeared for sentence upon his plea of guilty facing twenty years. The sentencing proceeding was concerned with only one issue: had Almestica kept his agreement with the government to fully cooperate in other cases? Instead of defending Almestica, who claimed that he had kept his promise, assigned counsel took the opposite stance, and vigorously contended--as did the prosecutor--that Almestica had gone back on his word. Faced with two attorneys taking but one position, the Court had no choice but to punish Almestica severely, The sentence for this sick adolescent, not accused of hurting or attempting to hurt anybody (there is no claim that he tried to shoot during the robbery) was eighteen years, one year in prison for each of his years on Earth.

A. Almestica's Counsel Abandoned Him and Actively Opposed His Interests

As can be seen by the seriousness and concern with which the participants below treated the issue of Almestica's cooperation, the most important factor on sentence can

be the extent of the defendant's efforts to assist the Government on other cases. Since the Court typically is not a party to the plea-bargain, and since consecutive sentences on similar charges is very rare, the gist of plea-bargaining in federal courts is what flows from the representation that the prosecutor makes to the Court at the time of sentence regarding defendant's cooperation. Moreover, this cooperation is the only factor that the defendant has control over; clearly he can't change the facts of his life or his crime by the time he plea-bargains. This Court can take judicial notice of the enormous degree to which sentencing judges are influenced by the defendant's cooperation.

After it had been established to both attorneys' satisfaction that Almestica had breached his promise to cooperate, the Court below stated "Mr. Almestica, you don't leave me much of a choice." (35) It is clear beyond any doubt that resolution of the issue of cooperation was crucial in Almestica's sentencing.

When the sentencing proceeding commenced, it was obvious that there was a problem regarding cooperation by Almestica. But instead of taking up his client's position, defense counsel launched an attack on Almestica for not living up to the alleged agreement and for changing his mind. Counsel stated "I think" Almestica had originally

promised to testify at trials and "I think" Almestica had now taken a different position. (27) At this point counsel was not telling the Court the truth about facts, as he no doubt must when he speaks, but was advocating a position that was entirely argumentative and merely one interpretation of what had been said during the plea bargain.

At the time the plea was entered, the Court carefully removed from all consideration any promises of representations that may have been made to Almestica regarding sentence. (11-12) The prosecutor then announced the agreement that had been made, which included Almestica's promise "to cooperate fully with the Government and to make a full, immediate and truthful disclosure of all information in [his] possession concerning other bank robberies of which [he has] knowledge and in which [he] participated. . . . That's the full extent of the Government's agreement with these two defendants." (12-13) Where was it written or said that "cooperate fully" meant testify at trial? Was it so clear to an eighteen-year old that that is what the quoted phrase encompassed?

The Court then asked Almestica if he understood the agreement, and received an affirmative answer, but not a recounting of just what Almestica took the agreement to mean. (13-14)

On the proceedings in open court, could it not be argued at all by a lawyer representing Almestica's

interests that the agreement was entirely vague as to the meaning of "full cooperation?" It is not amiss to point out that on occasion a prosecutor has considered the term "full cooperation" to include going out into the streets as an undercover operative. Was it clear beyond the bounds of advocacy that Almestica had promised to testify at trials? Defense counsel seemed to think so.

It is true that a second before the plea hearing was closed the prosecutor said that he will ask that sentencing be put off until Almestica fully cooperated, which 'will probably entail testifying at trial." (23) Did this off-handed remark mean that the agreement carefully placed on the record earlier was amended, and that Almestica was bound by the amendment? Did Almestica even know what "entail" meant? It is not beside the point to consider that this last remark by the prosecutor was made after, not before, Almestica entered his guilty plea.

In taking up the cudgels for the prosecution at the sentencing, defense counsel not only ignored the vagueness and ambiguity of the plea-bargain--especially as an eighteen-year-old could be charged with an understanding of it--but sealed his client's doom by putting his own, counsel's, intelligence, understanding, and integrity in issue. It was small wonder that when defense counsel finished the Court said "Mr. Almestica, you don't leave me much of a

choice." (35) The Court could have easily said "Defense Counselor, you don't leave me much of a choice."

After defense counsel's initial presentation, arguing that his client had reneged on the agreement, the prosecutor simply echoed what had been said. The latter's interpretation of the plea-bargain had to be convincing, following as it did on an identical interpretation by the defense. Who was left to point out to the Court the ambiguity, so apparent on the face of the plea minutes?

The prosecutor also read from a letter (not in the record). Since the letter was not even an exhibit, it cannot form the basis for an agreement binding on Almestica. Who this letter was to or from, and whether Almestica read it or had it read to him, or understood it if it was, are matters that the prosecutor did not comment on. (31-32) The prosecutor also referred to a recent visit he had made to Almestica in jail. (32-33) The record is silent, however, as to whether defense counsel was present, or had waived presence, or whether Almestica had waived the right to have counsel present.

Desperately Almestica tried to advocate his position pro se. He stated that he "did not see any contract whatsoever," possibly referring to the letter discussed above. (33) Laymen, of course, often think a contract must be in writing. Defense counsel said nothing about

whether his client knew of the letter.

Almestica then said he had not been presented with a contract to sign, although his lawyer had told him that such would be presented to him for signature. (33) "I were to sign it and therefore I would be sworn in as to my testimony, if it was needed in the trial . . . ." (33) This statement may have reflected Almestica's belief that his testimony might be admissible in written form. There is no way to tell, of course, since his counsel did not see fit to clarify what this troubled adolescent was trying to say.

Almestica denied making "any promises," but admitted he had said he "would help," and considered testifying before the grand jury "helping." (33) After Almestica protested that the agreement "wasn't down on any paper," defense counsel jumped to his "rescue" by stating "Your Honor, it is my understanding this was the agreement." (34) Scolding his client, defense counsel continued his advocacy of the government's case by saying "I think we took a long time, to be frank, to put this on the record at the time he pleaded." (34)

The Court asked if Almestica fully understood the agreement. Defense counsel, seemingly protecting his own flank said "I think Mr. Almestica is giving too much weight as to whether or not he and his attorney signed this

agreement. I think the agreement was put on the record at the time the defendant pleaded." (34) The Court then asked if counsel had explained the agreement at the time of the plea. (34-35) Counsel, instead of declining to bear witness against his own client, or asking leave to withdraw from the case so that Almestica would be protected by a defense advocate at this crucial stage, answered the Court with devastating effect: "He understands that, but unfortunately he has had a change of mind and it is his decision which he will have to live with." (35)

It is not submitted on this appeal that counsel's duty was to lie or mislead the Court on any matter, including whether counsel had sufficiently explained the plea-bargain to his client. What was called for was retention of the role and duties of the advocate, especially important at sentencing. See American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Defense Function [hereinafter cited as "ABA Standards'] § 8.1, Commentary a at 286 (1970). Counsel's duty was not to aid the court in adjudicating the case by being neutral and objective, but to help the system work by being an advocate. "The basic duty the lawyer for the accused owes to the administration of justice is to serve

as the accused's counselor and advocate . . . ." ABA Standards § 1.1(b). Could counsel function as an advocate while bearing witness against his own client?

Counsel's duty was to ask to remain silent, rather than answer questions that would hurt his client, or to seek leave to withdraw from the case--not protect himself by pitting his understanding of the agreement and his view of whether he had explained it sufficiently to his client against the assertions of his client that the agreement, as announced, had been fully performed, assertions which find a basis in the vagueness of the agreement. Certainly counsel's duty was not to advocate a given interpretation of the agreement at odds with that of his client's.

The situation faced by counsel when the Court asked him factual questions was analagous to that faced by an attorney whose client insists on testifying falsely (although it is not conceded here that Almestica was testifying falsely). The attorney is not supposed to "correct" the client's testimony, or argue against him in open court. The defense attorney's first duty is to try to withdraw from the case. ABA Standards § 7.7(b). If withdrawal is unfeasible or not permitted by the court, the lawyer must be passive--not actively contradict his client's testimony. ABA Standards § 7.7(c). Of course here, whether or not Almestica was being honest could not possibly be determined

while his attorney persisted in arguing and testifying against him.*

In sum, when a crucial issue was raised, instead of defending his client, counsel took up the government's position, perhaps to defend his own integrity and competence, or perhaps because he believed that the judicial system would be best served by an "objective" posture. But that was not his duty, nor was it permitted. At a hearing on counsel's competence he could have testified against his client to his heart's content--but not while he was still representing his client. As the ABA Standards show, standards arrived at by a conservative and responsible organization after long and careful exploration of the problem, counsel must try to withdraw from a case if he finds that his ethics are being compromised by his client. Such was not the situation here, since the record shows a basis for Almestica's position. But if counsel could not stomach pointing out the ambiguities in the plea-bargain, and if counsel believed his client was lying, his move was to try to withdraw, or remain silent on matters of fact, and not advocate against his

*At the risk of belaboring the obvious, it is pointed out that at the sentencing proceeding defense counsel's conduct was not "drawn into question," and so he was not entitled to reveal confidential matters. ABA Standards § 8.6(c).

client. Counsel was under no duty to compromise his representation just because the Court asked him questions. A respectful declination to answer, on the ground that to enter the debate as a witness would infringe upon his duties to his client, would have served his duties as an officer of the court.

These ethical requirements are hardly radical, or even controversial among those familiar with the defense function. Counsel was not required to defraud the Court, but just to stick by his client, or withdraw, or remain silent. Counsel's duties as an advocate do not include making it easier and more "efficient" to process cases by being neutral; that is not what the system demands of an attorney. Asking that he be replaced by another lawyer might have caused paper work, and hypothetically have incurred the annoyance of the Court; these are not reasons to abandon the defense of a client.

B. Decisions of this Court Compel Reversal for a Variety of Reasons

Because of the manner in which Almestica was represented at his sentencing, the sentence should be vacated and the case remanded for resentencing, at which time Almestica can be represented by new counsel advocating his interests. The decisions of this Court compel this

result under several theories.

1. Counsel's failure to advocate his client's position amounted to a conflict of interest

It is well-settled that when a defense attorney's advocacy on behalf of his client is compromised because of a conflict of interest, reversal is mandated. Glasser v. United States, 315 U.S. 60, 76 (1942). In this case, counsel's advocacy of a position contrary to that of Almestica's--for whatever reason--is similar enough to the conflict of interest situation (representation of more than one person with conflicting interests) to require reversal. Whether counsel is viewed as advocating his own interests, which diverged from that of his client's, or is considered to have simply abandoned his client's interests, a conflict of interest is presented. See United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).

2. Counsel's failure to support his client amounted to denial of the constitutional right to effective assistance of counsel

As a matter of constitutional law, Almestica is entitled to a reversal for a denial of the effective assistance of counsel. This Court has delineated the denial of that right as "the representation is so inadequate 'as to shock the conscience of the Court and make the

proceedings a farce and mockery of justice.'" United States v. Ortega-Alvarez, 506 F.2d 455, 458 (2d Cir. 1974). It is submitted that this standard is too strict, and carries far too much metaphorical weight to be of use as an analytic concept that separates out cases whose reversal is called for by the Sixth Amendment. While urging this Court to discard this standard, it is submitted that even under the quoted test reversal is required.

The first part of the standard requires that the conscience of this Court (not the court below, which could not have perspective on what was happening) be "shocked." Whether "shocked" is a figurative term or actually refers to a subjective feeling of the judges, it is submitted that what happened below was shocking. The best proof of this is to read the speeches of defense counsel, disregarding the name precedeing them, and to assume that they were made by the prosecutor. (27, 34, 35) Statements such as "I think Mr. Almestica is giving too much weight as to whether or not he and his attorney signed this agreement. I think the agreement was put on the record at the time the defendant pleaded," fit perfectly into the mouth of the Assistant United States Attorney. (34) That an argument so appropriate to the prosecution came from the lips of defense counsel is truly shocking.

Were the proceedings a "farce and mockery of justice?" To sentence a defendant when the only issue raised at sentencing is whether he lived up to his plea-bargain, and to have that issue aired on the same side by both prosecutor and defense counsel, is farcical. The adversary system calls for a conflict of positions, a dialectic from which the truth will emerge. This system is mocked when defense counsel abandons his role as advocate for the defendant. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." Anders v. California, 386 U.S. 738, 744 (1967). Is there any doubt that a criminal proceeding which leads to imposition of a term of imprisonment is a mockery when there is nobody to advocate the defendant's position, but instead his advocate argues and testifies against him?

3. Exercise of this Court's supervisory power over the administration of justice in the district courts of this Circuit calls for reversal

There is little question that the constitutional standard for reversal here is strict at least partially because it is applicable to state prisoners. The case

now before this Court comes from a United States court. This Court's supervisory power over the administration of justice in the federal courts of the Second Circuit is much broader and more discretionary than the Court's power to interpret and apply the constitution. See United States v. Jacobs, 531 F.2d 78, 90 (2d Cir. 1976) (uniform procedure in circuit); United States v. Toscanino, 500 F.2d 267, 276 (2d Cir. 1974) (obtaining personal jurisdiction over defendant through kidnaping and torture); United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972) (hearing before grand jury); United States v. Freeman, 357 F.2d 606, 614 (2d Cir. 1966) (definition of insanity; "Our duty to supervise the administration of justice in the courts of this Circuit can hardly be subject to the same restrictions as our power to impose consitutional requirements upon unwilling state tribunals.")

Viewed in the light of the supervisory power, the proceedings below hardly seem comforting, and at home with generally held notions of United States justice. Whether defense counsel's actions are considered to be in conflict with the duties of defense attorneys, or were in violation of the constitutional standard for effective counsel, there is little doubt that the eighteen-year sentence was not imposed after the proudest example of our adversary

system. It is submitted that the public interest will not be denigrated, but will be served if the sentence is vacated and there is a new sentence after another hearing below. This Court has been vigilant in its supervision of the prosecutorial function. See United States v. Burse, 531 F.2d 1151, 1154 (2d Cir. 1976), and cases cited. It should be no less vigilant in its supervision of the defense function.

CONCLUSION

THE SENTENCE SHOULD BE VACATED AND THE CASE REMANDED FOR RE-SENTENCING.

Respectfully submitted,

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October 18, 1976